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No. 85-1903

In the

Supreme Court of the United States

October Term, 1986

The State of Colorado,

Petitioner,

vs.

Richard Santistevan,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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ISSUES PRESENTED FOR REVIEW

I. Does the exposure to ultraviolet light of the surface of the hands of a person violate a reasonable expectation of privacy under the fourth amendment to the United States Constitution therefor constituting a "search"?

II. What is the correct standard to be used in evaluating investigatory techniques which are limited in both the manner in which the information is obtained and in the content of the information revealed by their use?

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Colorado District Attorneys Council and the states of Florida, Idaho, Indiana, Louisiana, Maryland, Missouri, North Dakota, Washington, and Wyoming, sponsored by their respective attorneys general, move for leave to file a brief in support of the petition for writ of certiorari for the following reasons.

1. Pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, consent to file an amicus brief need not be had when the brief is being presented for a state sponsored by its attorney general. However, one of the amici, The Colorado District Attorneys Council, is not within the provisions of Rule 36.4.

2. The amici have the consent of the petitioner through the Colorado Attorney General, but the respondent through his counsel, Garrett Sheldon, denies his consent.

3. The amici curiae have a substantial interest in seeing this holding reviewed because they are all officers, organizations of officers, or represent officers, with law enforcement responsibilities in their respective jurisdictions. The holding of the Colorado court purports to construe the prior holdings of this court and the fourth and fourteenth amendments of the United States Constitution, which are binding law on all of the amici curiae. In addition, the holding of the Colorado court relies on prior holdings of the state and federal circuit courts located in the states of several of the amici.

4. The brief of amici curiae sets forth the question of law raised by the Colorado Supreme Court in a broader context than presented by the petitioner and from the unique viewpoint of local law enforcement officers. The amicus brief presents the problems encountered by law enforcement in evaluating the proper use of sensory enhancement devices which have been occasioned by differing interpretations of the holding of this court in *Katz v. United States*, 389 U.S. 347 (1967).

Wherefor, the amici curiae move for leave to file a brief in support of the petition for writ of certiorari.

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OPINION BELOW

The opinion of the Colorado Supreme Court is published as *People v. Santistevan*, 715 P.2d 792 (Colo. 1986)

INTEREST OF THE AMICI CURIAE

All amici have the burden of law enforcement responsibility within their organizations and for their respective jurisdictions. The wide discrepancies in lower federal and state court decisions purporting to interpret and apply this Court's holding in *Katz v. United States*, 389 U.S. 347 (1967) has left law enforcement with little direction concerning the evaluation and use of emerging investigatory technologies. The amici have noted with interest and appreciation recent decisions of the Court which have clarified troublesome fourth amendment areas.[1] However, the need for a comprehensive standard to provide guidance for law enforcement agencies seeking to utilize new technologies and investigatory techniques is apparent.

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1. Among the most helpful of recent decisions are those which have developed clearly delineated rules for the use of sensory enhancement devices such as beepers *(United States v. Knotts*, 460 U.S. 276 (1983) and *United States v. Karo*, 468 U.S. ——, 104 S. Ct. 3296 (1984), trained narcotics detection dogs *(United States v. Place*, 462 U.S. 696 (1983), and flashlights *(Texas v. Brown*, 460 U.S. 730 (1983), as well as the clarification of existing concepts drawn from the fourth amendment to the United States Constitution, *Dow Chemical Company v. United States*, No. 84-1259, 54 U.S.L.W. 4464 (decided May 19, 1986); *California v. Ciraolo*, No. 84-1513, 54 U.S.L.W. 4471 (decided May 19, 1986) (concerning the concept of "curtilage" and its relationship to fourth amendment concerns).

CONSTITUTIONAL PROVISIONS

Amendment IV of the United States Constitution states in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

Amendment V of the United States Constitution states in pertinent part:

. . . nor shall be compelled in any criminal case to be a witness against himself. . . .

Amendment XIV, section 1 of the United States Constitution provides in pertinent part:

No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

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REASONS TO ALLOW THE WRIT

This honorable Court should issue its writ and review the holding of the Colorado Supreme Court because the case provides an excellent opportunity for the Court to review the use of sensory enhancement investigatory technologies both in a historical perspective and with a view toward future innovations. The factual situation presents the Court with the occasion to develop a standard not only for the use of ultraviolet examinations but also for the

evaluation of other emerging technologies.[2] The confusing and often conflicting applications of the Court's holding in *Katz v. United States, supra,* have made the evaluation by law enforcement of new investigatory techniques untenable.

The application of the *Katz* analysis to ultraviolet light examination has produced only one other case, *United States v. Keenan,* 496 F.2d 181 (1st Cir. 1974),[3]

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2. Several other techniques, which share with ultraviolet examinations the common characteristic of being limited in their intrusiveness, might also be considered if the Court decides to formulate a comprehensive standard. *See e.g. Lucas v. United States,* 411 A.2d 360 (D.C. App. 1980), *reh'g denied* 414 A.2d 830 (sensormatic shoplifting detection system); *State v. Howell,* 524 S.W.2d 11 (Mo. 1975) (trace metal detection to determine if the person tested has recently fired a gun).

3. The Colorado Supreme Court relied solely on *Keenan* in deciding the ultraviolet light examination in this case was a "search". However, the analysis of other cases contained in *Keenan,* including this Court's holding in *Schmerber v. California,* 384 U.S. 757 (1966), is flawed. In stating that the court in *United States v. Richardson,* 388 F.2d 842 (6th Cir. 1968) incorrectly relied on *Schmerber, supra,* the *Keenan* court did not follow the complete line of reasoning contained in *Schmerber* and eliminated the fifth amendment argument detailed in *Schmerber.* "We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body . . . . the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Schmerber, supra,* at 768. This Court concluded in *Schmerber* that the correct standard for evaluating procedures which implicate the fourth amendment is reasonableness. The *Keenan* court merely concluded that the ultraviolet light examination fell within the ambit of the fourth amendment without an inquiry into the reasonableness of its use in view of the circumstances of the case or the manner in which it was used. In not inquiring, the *Kee-*

(Continued on following page)

finding the examination is a "search" within the meaning of the fourth amendment. The rationale used to conclude that ultraviolet light examinations did not implicate fourth amendment rights is explained in *Commonwealth v. DeWitt,* 226 Pa. Super 372, 314 A.2d 27 (1973):

"In any event, defendants had no reasonable expectation of privacy as to the presence of foreign matter on their hands. . . The grease [which contained fluorescent powder] may be compared to a physical characteristic, such as a fingerprint or one's voice, which is 'constantly exposed to the public.' *United States v. Dionisio,* 410 U.S. 14, 93 S.Ct. 764, 35 L.Ed.2d 67 (1963). The Fourth Amendment provides no protection for what 'a person knowingly exposes to the public'. *Katz v. United States,* (citations omitted) It is true that the grease could not be seen with the naked eye, but then, neither may a fingerprint be examined until there has been an application of ink."[4]

If the defendant had no reasonable expectation of privacy then the investigatory procedure is not a search. However, law enforcement has been bewildered by the

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(Continued from previous page)

nan court landed in the same position in which it felt the *Richardson court* had landed; an unsupported conclusion. *Keenan, supra,* at 182 - 183, n. 1. An accurate application of the *Schmerber* analysis to ultraviolet light examinations can be found in *Commonwealth v. DeWitt,* 226 Pa. Super. 372, 314 A.2d 27 (1973), a case which was not cited in *Keenan.*

4. Several other state and federal courts have used the *Katz* analysis to conclude that ultraviolet light examinations do not implicate fourth amendment rights. *See United States v. Richardson,* 388 F.2d 842 (6th Cir. 1968); *United States v. Millen,* 338 F.Supp. 747 (E.D. Wis. 1972); *United States v. DeMarsh,* 360 F.Supp. 132 (E.D. Wis. 1973).

problems of determining in any given situation the level of the expectation of privacy purported to be held by the individual, satisfying the first prong of the *Katz* test, or by society, satisfying the second prong.[5] For example, the presence of a third party when a conversation concerning illicit activities takes place, even when the third party is a trusted confident of the conspirators, certainly lends a diminished expectation of privacy. *See Hoffa v. United States,* 385, U.S. 293 (1966); *and also, United States v. White,* 401 U.S. 745 (1971). However, other situations which seemingly have the aura of privacy surrounding them, such as conversations in locked hotel rooms or with no one else present, give rise to no expectation of privacy. *See, e.g. United States v. Agapito,* 620 F.2d 324 (2d Cir. 1980) (individual who speaks in normal tones but is still overheard by the naked ear has no reasonable expectation of privacy); *United States v. Jackson,* 588 F.2d 1046, 1051-53 (5th Cir. 1979) (conversation in motel room which are audible to one in adjoining room constitute words exposed to the "plain view" of others.); *United States v. Llanes,* 398 F.2d 880 (2d Cir. 1968), *cert. denied,* 393 U.S. 1032 (1969) (individual who speaks in tone audible to person standing outside of his door has no expectation of privacy). Compounding this question of determining the level of privacy expected, some decisions indicate that even a reasonable expectation of privacy "must be subordinated

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5. This Court has recognized the difficulties inherent in determining which expectations are deemed reasonable by society; "[o]ur problem, in terms of the principles announced in *Katz,* is what expectations of privacy are constitutionally 'justifiable' — what expectations the Fourth Amendment will protect in absence of a warrant." *United States v. White,* 401 U.S. 745, 752 (1970).

to the public interest in law enforcement." *United States v. Fisch,* 474 F.2d 1071, 1078 (9th Cir. 1973), *cert. denied per curium,* 412 U.S. 921 (1973).[6]

What, then, is the standard to be used in evaluating the level of expectations of privacy when sensory enhancement devices are used by law enforcement? How is the constitutional standard affected when the device or investigatory technique is "limited by the procedure?" *United States v. Place,* 462 U.S. 696, 707 (1982). This court has determined that "[n]othing in the Fourth Amendment prohibits the police from augmenting the sensory facilities bestowed on them at birth with such enhancements as science and technology afford." *United States v. Knotts,* 460 U.S. 276, 282 (1983). It is the evaluation of the *use* of sensory enhancement devices and investigatory techniques which appears unworkable.

The standard to be applied appears to be vitally linked to the intrusiveness, or lack of it, of the investigatory method. Standards of reasonableness in fourth amendment cases have been delineated by balancing the need to search against the invasion which the search entails. *Camara v. Municipal Court,* 387 U.S. 523, 536-537 (1967). *See also, United States v. Albarado,* 495 F.2d 799, 806 (2d Cir. 1974). Justifications for any specific intrusion are dependent on a determination of whether the intrusion is a

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6. *See also, Camara v. Municipal Court,* 387 U.S. 523, 533 (1967) "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."

search or merely an investigatory procedure. For if the action is investigatory, justification need reach only the level of a "specific and articulable" suspicion rather than probable cause. *Terry v. Ohio*, 392 U.S. 1, 21 (1968)[7]. These seemingly clear cut pronouncements of the Court have not been easily applied in the context of new technologies.[8]

The amici believe this honorable Court has already begun to enunciate a clear test based on *Terry*, a test which law enforcement can utilize in evaluating whether investigatory procedures such as the use of sensory enhancement techniques constitute a "search". *United States v. Place, supra.* The examination of a person's hands, normally exposed to the public, under an ultraviolet light is analogous to the "canine sniff" analyzed in *Place.* "[T]he manner in which the information is obtained through this investigative technique is much less intrusive than a typical search." *Place, supra*, at 707.

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7. *See also United States v. Beale (Beale II)*, 736 F.2d 1289, 1294 (1984) (Pregerson, J., dissenting), *cert. denied* —— U.S. ——, 105 S.Ct. 565 (1985) in which Circuit Judge Pregerson argues that while limited in their intrusiveness, dog sniffs are searches, but they do not require warrants. Rather, a "founded or articulable" suspicion would be sufficient justification for the search. That there are some "permissable intrusions less severe than full scale searches or seizures without the necessity of a warrant," was also stated by this Court in post-*Terry* case of *Texas v. Brown*, 460 U.S. 730, 736 (1983) evincing that the doctrine is still developing.

8. *See United States v. Smith*, 643 F.2d 942 (2nd Cir. 1981), *cert denied* 454 U.S. 875 (1981) in which an x-ray scan of the defendant's person was deemed to be a search unsupported by probable cause but no warrant was required because the intrusion was tailored to the need for further investigation.

The person need only place his hand under the light for a few seconds. Being portable, the light can be carried to a location convenient to the person who will be examined, obviating the need for detention. The information obtained is extremely limited; only the presence or absence of fluorescent powder is disclosed. The ultraviolet technique does not offend or embarrass any innocent persons because it specifically and only shows the physical fact of the presence of fluorescent powder.[9] Prior to *Place,* some lower courts upholding "canine sniffs" placed emphasis on the idea that because no "mechanical or electronic device was used" the scrutiny of the technique should be lower. *People v. Evans,* 65 Cal. App.3d 924, 936, 134 Cal Rep 436, 443 (1977). This highly technical distinction between natural and mechanical means seems ill suited to a world filled with everchanging technological advances and inventions. *See United States v. Lee,* 274 U.S. 559, 563 (1927) (use of searchlight comparable to use of a marine glass); *Smith v. Maryland,* 442 U.S. 735, 744 - 745 (1979) (use of modern electronic switching equipment merely the modern counterpart of the operator); *United States v. Knotts, supra,* at 282 (beeper signal was the equivalent of visual surveillance). It can be said that fluorescent pow-

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9. The series of inquiries delineated in *Place* has been applied to other investigatory techniques being considered by lower courts. *Lucas v. United States,* 411 A.2d 360 (D.C. App. 1980), *reh'g denied* 414 A.2d 830 (D.C. App. 1981) "Unlike any technique heretofore passed upon by this court, this device does not search or scan generally for items in which the subject has a proprietary interest. It reveals nothing about the subject.... It is the preciseness of the sensormatic equipment, not in terms of detecting what it searches for but, more importantly, in terms of not detecting anything it is not searching for that makes its use reasonable." *Lucas, supra,* at 364.

der and the subsequent ultraviolet light examination is no more than a modern equivalent to a visual observation, by the officer, of the defendant handling the contraband or marked item. Similarly, an exploding dye packet placed in the contraband would result in a set of "naked eye" observations not only by law enforcement but by any member of the public similar, if not identical, to the findings produced by the fluorescent powder and ultraviolet light examination.

CONCLUSION

The instant case presents the Court with a clear fact pattern in which to resolve the conflicting viewpoints of both state and federal courts concerning the use of ultraviolet light examinations. The opportunity is available for the Court to provide those with law enforcement responsibilities a clear standard for the evaluation of existing and emerging sensory enhancement and investigation techniques while clarifying the effect on that analysis of techniques which are limited in intrusiveness, scope and manner of inquiry. Such a standard would also resolve the current problems associated with determinations of privacy levels expectations in a variety of factual situations.

Respectfully submitted,

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